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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD KEITH JORGENSEN,

Defendant and Appellant.

F071472

(Super. Ct. No. F09901895)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Hill, P.J., Poochigian, J. and Detjen, J.

Appellant Richard Keith Jorgenson appeals from the denial of his petition for resentencing filed pursuant to Proposition 47. Appellant contends he was eligible for resentencing on his 2010 conviction for second degree burglary (Pen. Code, §§ 459, 460, subd. (b))¹ because he entered a commercial establishment with the intent to fraudulently obtain property. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2009, appellant was charged by information with 47 criminal counts, including, among others, identity theft, fraud, and second degree burglary. In March 2010, appellant entered into a plea bargain whereby appellant pled guilty to three charges, one count of identity theft (§ 530.5, subd. (a); count 1), one count of second degree burglary (§§ 459, 460, subd. (b); count 35), and one count of forgery (§ 470, subd. (b); count 36), and admitted to having a prior strike conviction.² In exchange, appellant received a sentence of nine years, eight months and the remaining counts were dismissed.

Following enactment of Proposition 47, appellant petitioned to have each of his convictions reduced to misdemeanors. With respect to the conduct supporting appellant's burglary conviction, the parties both rely exclusively on the trial court's factual summary from the order denying appellant's petition, which found as follows:

“On June 9, 2008, Jorgenson entered the Home Depot in Fresno County and attempted to purchase \$468 worth of property with a Home Depot credit card under the name of James Trapp. [Citation.] The record of conviction in this case establishes that Jorgenson entered a commercial establishment during regular business hours. The record further reflects the amount of property Jorgenson intended to take was below the \$950 limit.”

¹ All statutory references are to the Penal Code.

² Appellant concedes the identity theft and forgery counts are not eligible for resentencing.

Appellant's argument before the trial court was that he entered Home Depot with the intent to commit theft by false pretenses, which he alleged was a form of larceny, and thus had committed the newly enacted crime of shoplifting. The trial court disagreed, finding both that appellant entered Home Depot with the intent to violate section 530.5, which is not a theft offense, and that entering with the intent to commit theft by false pretenses would not qualify as a minor crime subject to resentencing. The court therefore denied appellant's petition. This appeal timely followed.

DISCUSSION

Appellant argues the trial court erred by failing to recognize that entering a store with the intent to fraudulently obtain goods qualifies as entering with the intent to commit larceny as that term is properly understood with respect to shoplifting under Proposition 47.

Standard of Review and Applicable Law

"In November 2014, California voters enacted Proposition 47, which 'created a new resentencing provision: section 1170.18. Under section 1170.18, a person "currently serving" a felony sentence for an offence that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be "resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." ' ' ' (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448 (*Rivas-Colon*).)

"Proposition 47 added section 459.5, which classifies shoplifting as a misdemeanor 'where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).' (§ 459.5, subd. (a).) '[T]o qualify for resentencing under the new shoplifting statute, the trial court must determine whether

defendant entered “a commercial establishment with intent to commit larceny while that establishment [was] open during regular business hours,” and whether “the value of the property that [was] taken or intended to be taken” exceeded \$950. (§ 459.5.)’ ” (*Rivas-Colon, supra*, 241 Cal.App.4th at p. 448.)

The trial court is tasked with determining whether a petitioner is eligible for resentencing. (§ 1170.18, subd. (b).) However, a petitioner has the initial burden of introducing facts sufficient to demonstrate eligibility. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880 (*Sherow*).)

The court’s review of the meaning of a voter initiative is de novo. (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1113-1114.) Factual findings of the trial court are reviewed “for substantial evidence and the application of those facts to the statute de novo.” (*People v. Johnson* (2016) 1 Cal.App.5th 953, 960.) The record is viewed in the light most favorable to the trial court’s ruling with a presumption that the order was correct. (*Ibid.*)

Appellant’s Conduct Does Not Qualify as Larceny

This court recently analyzed the meaning of the shoplifting statute and found that larceny, as used in that statute, should be interpreted according to its common law definition. (*People v. Martin* (Dec. 12, 2016, F071654) ___ Cal.App.5th ___, ___ [2016 Cal.App. LEXIS 1077, *25].) As such, to demonstrate eligibility, appellant must point to facts showing an intent to commit a trespassory taking, among other elements. (*Ibid.*) As we detailed in *Martin*, intending to commit theft by false pretenses, through a fraudulent acquisition of goods, does not qualify as larceny under this definition. (*Id.* at pp. ___ - ___ [*id.* at pp. *25-*26].) The facts relied upon by the parties show appellant attempted to fraudulently obtain goods through what was believed by the victim to be a valid sale, thus failing to satisfy the common-law definition of a trespassory taking. Appellant’s second degree burglary conviction does not, therefore, qualify for resentencing.

DISPOSITION

The order is affirmed.